MICHIGAN
LAW REVIEW

VOL. XIII. DECEMBER, 1914 NO. 2

CORPORATIONS AND EXPRESS TRUSTS AS BUSINESS ORGANIZATIONS.*

Advantages Claimed.

PRESIDENT BUTLER of Columbia University is reported to have said in an address before the New York Chamber of Commerce in 1911, that "the limited liability corporation is the greatest single discovery of modern times, whether you judge it by its social, by its ethical, by its industrial, or, in the long run—after we understand it and know how to use it,—by its political, effects."[1]

In 1912, in a paper submitted to the Tax Commissioner of Massachusetts, Alfred D. CHANDLER, of the Boston Bar, said "Express Trusts, whether created under wills, deeds of settlement, assignments for the benefit of creditors, receiverships, or by special declarations of trust, to manage property or carry on business, are neither corporations nor joint stock companies, nor partnerships, but they employ a distinct and the highest known method of administration."[2]

The latest Statistical Abstract shows that in 1913, there were in the United States 305,336 corporations, with over $96,000,000,000 of stock and bonds, with an income of over $3,800,000,000, and paying a tax to the Federal government of over $35,000,000. The stock and bonds together represent nearly or quite two thirds of the wealth of the whole country. In 4 years, 1909-1913, the number of corporations increased over 40,000, and the stock and bonds over $12,000,000,000.[3]

* Address before the North Dakota State Bar Association, Sept. 17, 1914.

[1] The Government and the Corporations, by Francis Lynde Stetson, 110 Atl. M., p. 27, 32 (July, 1912) quoting from Pres. Butler.

[2] Express Trusts under the Common Law, by Alfred Chandler, p. 26. Little, Brown & Co. 1912.

[3] United States Statistical Abstract, 1913, p. 600.

In conservative Massachusetts in the five years, 1907-1911, about 6,500 corporations were created; and during the same period over 4,000 were dissolved by the legislature. In 1911, it was reported that 4,000 California corporations would be dissolved for failure to pay a license tax, and 4,000 more in Missouri for failure to file the annual anti-trust statement. This shows an extraordinary mortality among corporations in these states.[4]

In 1912, Express Real Estate Trusts in Boston alone owned $250,000,000 of property and there had been no deaths among 17 of them in 14 years.[5]

In 1905, President SIMMONS of the Fourth National Bank in New York, and of the New York Stock Exchange, said: "The extension of the principle of incorporation has enabled leaders in business to set up two standards of morality, to maintain a Jekyll and Hyde duality, and to do as members of an impersonal and non-moral corporate body acts which they would shrink from as individuals. In private life they are stainless, but in the interests of corporations, * * * they will have recourse to every villainy damned in the decalogue."[6] And in 1910, President WILSON, in his address before the American Bar Association pleaded "earnestly for the individualization of responsibility within the corporation, for the establishment of the principle of law that a man has no more right to do wrong as a member of a corporation than as an individual."[7]

On the other hand to quote MAITLAND, "It is said—and appeal is made to long experience,—that men are more conscientious when they are doing acts in their own names than when they are using the name of a corporation."[8] "A very high degree not only of honesty, but of diligence has been required of trustees."[9] "No higher standards of administrative conduct are evoked by Courts than those which trusts require."[10]

Special Advantages of Corporations.

The advantages of incorporation have long been recognized and frequently referred to in the literature of our law. More than six hundred years ago, BRACTON said: "If an abbot, or prior * * *

[4] Chandler, Express Trusts, p. 10, and Supplement.

[5] Report of Tax Commissioner (Wm. D. T. Trefry), Mass. 1912, p. 18. Chandler, Express Trusts, p. 11.

[6] As quoted by Chandler, Express Trusts, p. 20, from the New York Daily Tribune, Oct. 7, 1905.

[7] The Lawyer and the Community, Am. Bar Assn. Rep., 1910, pp. 419, 438.

[8] Maitland, Trust & Corporation, Collected Papers, Vol. III, p. 362.

[9] Ib., p. 352.

[10] Chandler Express Trusts, p. 24.

claim land in the name of their church upon the seisin of their predecessors * * * the declaration should not be from abbot to abbot, or prior to prior, nor should there be mention of the intermediate abbots or priors, because in colleges and in chapters the same corporation always remains, although they all die successively and others are substituted in their place, as may be said of flocks of sheep, where there is always the same flock, although all the sheep or heads successively depart, nor does any individual of them succeed to another by right of succession in such manner that the right descends by inheritance from one to another, because the right always pertains to the church, and remains with the church. * * * And accordingly if the abbot or the prior, the monks or canons successively die, the house remains to eternity."[11]

BLACKSTONE writing five centuries later than BRACTON, and at the very beginning of the application of science and invention to industrial conditions, in anything like modern ways, says in summing up the corporation law of his time:—

"To show the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum,* for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so; but they neither frame, nor receive any laws or rules of of their conduct; none at least which would have any binding force, for want of coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities; for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And, when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves? So, also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one *person* in law; as one person, they have one will, which is collected from the sense of the majority of the individuals; this one will may establish rules and orders for the regulations of the whole, which

[11] Bracton, Treatise on Laws of England, (c. 1264), Vol. 5, Twiss's Ed., pp. 447-449.

are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws; the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be forever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant."[12]

In 1819 Chief Justice MARSHALL put it this way: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality: properties by which a perpetual succession of many persons are considered as the same, and may act as a single, individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing the bodies of men in succession with those qualities and capacities that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."[13]

Special Advantages of Express Trusts.

Upon the other hand the special advantages of Express Trusts have recently been stated as follows:[14]

(1) These associations have been found by the experience of twenty-five years to be a convenient, safe and unobjectionable method of coöperative ownership and management.

(2) The form of organization ensures a continuity of management and control which appeals strongly to investors in real estate, which cannot be secured by a corporation with changing officers. The trustees who are the managing officers of a trust are not so likely to be changed as are the directors of a corporation.

---

[12] Blackstone, Commentaries, (1765), Ch. 18, Of Corporations.
[13] Trustees of Dartmouth College v. Woodward, (1819), 4 Wheat. (17 U. S.) 518.
[14] Report of Tax Commissioner of Mass., 1912, p. 21.

(3) It affords a more economical and more convenient and flexible form of management than does a corporation. Trustees can transact business with more ease and rapidity than directors.

"In the early development of uses a device was struck upon that gave permanence as well as relief from the various feudal burdens. This was the joint tenancy. An owner will convey his land to a party of friends, to hold as joint tenants. "There will then be no inheritance, and no relief, wardship, marriage. By keeping up the wall of joint tenants, by feoffment and refeoffment, he can keep out the lord and can reduce the chances of reliefs and so forth to nothing."[15] There is here no inheritance, only accrescence.[16]

Mr. MAITLAND names "a few typical instances of unincorporated bodies" that have lived behind the trustee wall for long periods of years." He says "Imagine a foreign tourist, with Baedeker in hand visiting one of our 'Inns of Court,' let us say Lincoln's Inn. He sees the chapel and the library and the dining hall; he sees the external gates that are shut at night. * * * On inquiring he hears of an ancient constitution that had taken shape before 1422. * * * You have here a *Privateverein* which has not even juristic personality. * * * Its members might divide the property that is held for them by trustees. * * * The English judges who received and repeated a great deal of the canonistic learning about corporations * * * were to a man members of these * * * and had never found that the want of juristic personality was a serious misfortune.[17]

Then there are (or were until 6 weeks ago) the ships of Commerce carrying the name of Lloyds into all the seas of the world; almost from the beginning there was among these insurers of the world's commerce only a very loose organization with the exclusive use of a coffee house, and a small trust fund, until the trust deed of 1811 was executed with over 1,100 signatures, and until 1871 "it was an unincorporated *Verein,* without the least trace (at least so we said) of juristic personality about it." It was incorporated in 1871, because in that year there was recovered from the Zuyder-Zee, a large mass of treasure that had been lying there since 1799, and, because of the destruction of records by fire, it belonged to no one could say whom.[18]

There is also the London Stock Exchange, beginning in 1773 when the name was "wrote over the door" at New Johnathan's Coffee House. "In 1802 a costly site was bought, a costly building erected,

[15] Maitland, Lectures on Equity, p. 26.
[16] Maitland, Trust & Corporation, Collected Papers, Vol. III, p. 336.
[17] Maitland, Trust & Corporation, Collected Papers, Vol. III, p. 369-371.
[18] Ib. pp. 371-373.

and an elaborate constitution was formulated in "a deed of settlement." There was a capital of £20,000 divided into 400 shares. Behind the trustees stood a body of "proprietors," who had found the money; and behind the "proprietors" stood a much larger body of "members" whose subscriptions formed the income that was divided among the "proprietors." "In 1876 there was a new deed of settlement; in 1882 large changes were made in it; there was a capital of £240,000 divided into 20,000 shares. * * * The organization is of a high type. * * * In 1877 a Royal Commission * * * recommended that the Stock Exchange should be incorporated," and the *bye laws* be made subject to the approval of the Board of Trade. "That was the Cloven hoof. *Ex pede diabolum.*" It was not incorporated, yet MAITLAND says: "it would not, I think, be easy to find anything that a corporation could do that is not being done by this *nicht rechtsfähige Verein*" (society without legal capacity).[19] The New York Stock Exchange also is unincorporated.

MAITLAND, with his delightful humor, says again: "I believe that in the eyes of a large number of my fellow countrymen, the most important and august tribunal in England is not the House of Lords but the Jockey Club. * * * Some gentlemen form a club, buy a race course, the famous Newmarket Heath, which is conveyed to trustees for them, and then they can say who shall and who shall not be admitted to it. I fancy, however, that some men who have been excluded from this sacred heath ("warned off New Market Heath" is our phrase), would have much preferred the major excommunication of that "historic organism" the Church of Rome."[20]

This reference to the Church justifies further quotation from MAITLAND. He says "All that we English people mean by "religious liberty" has been intimately connected with the making of trusts. * * * If in 1688 the choice had lain between conceding no toleration at all and forming corporations of Nonconformists," they would have been "Untolerated for a long time to come, for in England, as elsewhere, incorporation meant privilege and exceptional favour. And, on the other hand, there were among the Nonconformists many who would have thought that even toleration was dearly purchased if their religious affairs were subjected to State control. * * * If the State could be persuaded * * * to repeal a few persecuting laws * * * Trust would do the rest * * *. Trust soon did the rest. * * * And now we have in England Jewish Synagogues and Catholic cathedrals and the churches and chapels of

[19] Ib. pp. 373-376.
[20] Ib. p. 376.

countless sects. They are owned by natural persons. They are owned by trustees."[21]

In this way were the lands of the Methodist churches and chapels held throughout England and the United States, under model deeds used by John Wesley in the very beginning of his ministry to the effect that the trustees, for the time being should permit Wesley himself, and such other persons as he might, from time to time appoint, to have the free use of such premises, to preach therein God's holy word, and after his death "for the sole use of such persons as might be appointed by the yearly conference;"[22] these deeds were confirmed and made perpetual under his deed of trust of 1784, establishing the Methodist General Conference of 100, and which has been called the Magna Charta of that church.[23]

And although our Supreme Court has recently held, following the Supreme Court of the Philippine Islands, that the Roman Catholic Church is a corporation "which antedates by almost a thousand years any other personality in Europe,"[24] yet the great "organized operative institution" known as the Established Church of England, tracing its existence back to Theodore of Tarsus, 669 A. D. "is not a corporate body."[25]

It would seem from these illustrations, that other institutions known to the law based upon trusteeships rival in duration and permanence the immortality of corporations.

It is my purpose to compare these two,—Corporations and Express Trusts,—in such detail as my time will permit, to discover, if perchance we may, something of the strength and weakness of each, for business purposes, under present day conditions.

Theory of Corporate Existence.[26]

A recent definition by Chief Justice BALDWIN of the Connecticut Supreme Court, says a corporation is "an association of persons to whom the sovereign has offered a franchise to become an artificial,

---

[21] Ib. pp. 363-364.

[22] Life and Times of John Wesley. by L. Tyerman, Vol. 3, p. 419; Lost Chapters from Early History of American Methodism, by J. B. Wakeley, p. 58, where a copy of the deed for a Methodist Preaching-house, on John Street, N. Y., dated Nov. 2, 1770, is given.

[23] Tyerman, p. 421.

[24] Barlin v. Ramirez (1906), 7 Phil. 41; Ponce v. Roman Catholic Church (1908), 210 U. S. 296; Santos v. Roman Catholic Church (1909), 212 U. S. 463.

[25] 3 Encyc. of Laws of England, p. 14; 2 Stephen's Commentaries, 16th Ed. (1914), p. 806; 11 Halsbury's The Laws of England, p. 371, Sec. 706 (Ecclesiastical Law).

[26] Bibliography:

Angell and Ames, Law of Private Corporations, Introduction and Ch. I. (1st Ed. 1831, and subsequent editions.)

Baldwin, S. E., History of the Law of Private Corporations in the Colonies and

States, Yale Bicen. Pub. 1901, p. 261, 3 Select Essays, Anglo-Am. Legal Hist., p. 236; Freedom of Incorporation, (in Modern Political Institutions, 1898).

Blackstone, Sir Wm., Commentaries (1765), Bk. I, Ch. xviii.

Brissaud, J., History of French Private Law, Continental Legal History Series, (1912), pp. 889-905.

Brown, W. Jethro, The Austinian Theory of Law, (1906), pp. 254-270; The Personality of the Corporation and the State, 21 Law Quart. Rev. 365.

Carr, Cecil Thomas, Early Forms of Corporateness. Ch. IX, in General Principles of the Law of Corporations, 3 Select Essays, Anglo-Am. Legal Hist. (1905), p. 161; Select Charters of Trading Companies, 1530-1707. Selden Society, Vol. 28 (1913).

Cawston and Keane, The Early Chartered Companies, 1296-1858, (1896).

Clark and Marshall, Private Corporations, Vol. I, Ch. I.

Davis, John P., Corporations, A Study of Origin and Development, (1905); Nature of Corporations, 12 Polit. Science Quar. 273.

Deiser, George F., The Juristic Person, 57 Am. Law Reg. (O. S.) 131, (1908).

Elliot, C. B., Private Corporations, Ch. I, (1897).

Evans, F., The Evolution of the English Joint Stock Trading Company, 8 Columbia L. R. 339, 461 (1908); What is a company? 26 Law Quart. Rev. 259-263.

Freund, E., Legal Nature of Corporations, University of Chicago Studies in Political Science.

Geldart, W. M., Legal Personality, 27 Law Quart. Rev., 90 (1910).

Gierke, O., Political Theories of Middle Ages, tr. by F. W. Maitland (1913), Introduction pp. viii-xliii, 67-73, with notes.

Holdsworth, W. S., History of English Law, Vol. 3, pp. 362-376.

Johnson, A. B., Legislative History of Corporations in New York, 20 Hunt's Merchant's Magazine, 610 (1850).

Kent, James, Commentaries, (1827), Vol. II, Lect. 33.

Kyd, S., Corporations (1793), Introduction.

Machen, A. W. Jr., Corporate Personality, 24 Harv. Law Rev., (1911), pp. 253, 347.

Maitland, F. W., The Crown as Corporation, 3 Coll. Pap. pp. 244-270; The Unincorporated Body, Ib., pp. 271-284; The Body Politic, Ib., pp. 285-303; Moral Personality and Legal Personality, Ib., pp. 304-320; Trust and Corporation, Ib., pp. 321-404. See also 14 Journal Comp. Leg., p. 192.

Manson E., Evolution of the Private Company, 26 Law Quart. Rev., pp. 11-16.

Merritt, W. W., Some Views of the Nature and Effect of Corporateness, 10 Mich. Law Rev., p. 310 (1912).

Miraglia, Luigi, Comparative Legal Philosophy, (Vol. III, Modern Legal Philosophy Series, tr. by John Lisle, 1912), Ch. III, Incorporeal Persons, pp. 361-381.

Moore, J. H., Development of Corporation Law in this Country, Ark. Bar Assn. Rep. (1909), pp. 45-81.

Morawetz, V., Private Corporations, Preface, 2d Ed. (1886).

Pike, L. O., Introduction to Year Book, 16 Ed. III, part I, p.xlvi.

Pollock, Sir F., Contracts, 6th Ed., 108; 7th Ed., 113; Has the Common Law Received the Fiction Theory of Corporations? 27 Law Quart. Rev. 219 (1911).

Pollock and Maitland, History of English Law, pp. 469-511, 660-688.

Radin, Max, Legislation of Greeks & Romans on Corporations (1909).

Rashdall, H., The Universities and the Legislature, 29 Law Quart. Rev., 76-84 (1913).

Raymond, R. L., The Genesis of a Corporation, 19 Harv. Law Rev. 350 (1906).

Salmond, J. W., Jurisprudence, Ch. XV, (3d Ed. 1910).

Scott, W. R., Constitution and Finance of English & Irish Joint Stock Companies to 1720, 3 Vols. (1910-1912).

Seymour, E. B., History of the Common Law Conception of a Corporation, 42 Am. L. Reg. (N. S.), 1902, p. 529.

Sheppard, Wm., Corporations, Fraternities, and Guilds (1659).

Smith, H. A., The Persons Ficta, 26 Jurid. Rev., pp. 59-74 (1914).

Sohm, R., The Institutes of the Roman Law, Ledlie's trans., 2d Ed. (1901), Ch. II, pp. 195-214.

State Trials, (King v. City of London), Vol. 8, pp. 1039-1358 (1682).

juridical person, with a name of its own, under which they can act and contract, and sue and be sued, and who have accepted the offer and effected an organization in substantial conformity with its terms."[27]

There are three fundamental ideas here: A corporation is a new *person* in the law resulting from the acceptance of a *franchise* to become such, by an *association* of persons.

The first of these,—that a corporation is a *person,*[28] separate from its members, has already been referred to as its chief characteristic and advantage. This idea of the personality and unity of a group is not new but old, almost as old as language. We are told nowadays that the primitive mind of man had a more definite and positive idea of the unity and solidarity of the horde, or pack, or clan or tribe of savage hunters and warriors, than it had of the personality of its individual members.[29]

Among all the Aryan peoples,—Hindu, Greek, Roman, Teuton, or Slav,—the oldest artificial person seems to have been the family.[30] The Ancient Egyptians and Babylonians personified the Temple.[31] Long before JUSTINIAN all the members of a corporation were considered one person or body in the Roman Law.[32]

The canonists of the 13th century call it a *persona ficta,* not found in the world of sense, but created by law, invisible, immortal, a body that has no body and no soul; it cannot sin, or be excom-

---

Sutton's Hospital Case, 10 Coke Rep., pp. 1-35 (1613).

Taylor, H. O., Private Corporations, Prefaces, and Chs. I-IV. (1884 and subsequent editions).

Trapnell, Benj., The Logical Conception of a Corporation, West Virginia Bar Assn. Report 1896, Appendix to Clark on Corporations, 1st Ed., p. 643.

Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518.

Wilgus, H. L., Corporation Cases, pp. 1-167 with notes (1900).

Williston, Samuel, History of the Law of Business Corporations before 1800, 2 Harv. Law Rev., 105, 149 (1888), 3 Select Essays Anglo-Am. Legal Hist. p. 195.

Wormser, I. M., Piercing the Veil of Corporate Entity (1912), 12 Col. Law Rev. 496.

Wright, A. G., The California State Tax on Corporate Franchises, 1 Cal. Law Rev. 91, (1913).

Young, E. H., Legal Personality of a Foreign Corporation, 22 Law Quart. Rev. 178 (1906). Foreign Companies and Other Corporations, Cambridge University Press, 1912.

(The foregoing bibliography includes only such works as contain important matter relating to corporate theory or history.)

[27] Mackay v. N. Y., N. H. & H. R. R. (1909), 82 Conn. 73, 81, 72 Atl. 583.

[28] See particularly in bibliography given in note 26 above, Blackstone, Brissaud, Brown, Carr, Deiser, Freund, Geldart, Gierke, Machen, Maitland, Miraglia, Pike, Pollock, Salmond, Seymour, Sohm, Wilgus.

[29] Morawetz, § 1, p. 2.

[30] Hearn, The Aryan Household, pp. 64-6.

[31] Johns, C. H. W., Babylonian & Assyrian Laws, Contracts & Letters, Ch. XX (1904); Simcox, E. J., Primitive Civilizations, Vol. I, pp. 171-179.

[32] Amos, Sheldon, History and Principles of Civil Law of Rome, p. 118.

municated, nor commit a crime, and probably not a tort.[33] Early in the 14th century these words were being repeated in the year books of English law by the English judges. In 1311 it was considered a body (*un corps*), existing *per se,* and not appendant or appurtenant to something else.[34] And only a short time ago Mr. Justice McKENNA, of the United State Supreme Court said "Undoubtedly a corporation is in law, a person or entity entirely distinct from its stockholders and officers."[35] It is such, for the most part, in relation to outside parties; it has rights of property and reputation, and is subject to general duties under the common law and statutes; and is also considered a person as to ownership of property, and suing and being sued, and in considerable measure it is so under the protection of constitutional and treaty provisions.[36]

The second of these,—that a corporation results from the acceptance of a *franchise*[37] from the state,—although now so frequently criticized or belittled, historically has been as important as the *personality* of the corporation. In fact in legal theory, the privilege, the franchise itself, is the capacity of separate personality, conferred upon the group. The legal ideas involved come from the Roman and from the Feudal law. From the Roman, the franchise is a privilege of a public nature conferred by the state for political or public reasons. Anciently perhaps in Greece and Rome groups of persons were associated without authority of the state, and acted much as a single person; but the Romans were jealous of such and many laws were made against illicit companies between the Twelve Tables (450 B. C.) and the Empire; Caesar and Augustus did the same; and in the time of Gaius, and Marcian, corporations could be created only under special or general legislative authority.[38]

The same Political theory of corporate existence prevailed in the middle ages. "The corporation is and must be the creature of the state. Into its nostrils the state must breathe the breath of fictitious life, for otherwise it would be no animated body but Individualistic dust."[39] In the Year Books of our law in 1376, it was ruled that

---

[33] Pollock & Maitland, Hist. Eng. Law, p. 477. Note Wilgus's Cases, pp. 72-79.

[34] Y. B., 4 Ed. II, 103; Y. B., 16 Ed. III; Pike's Introduction.

[35] McCaskill Co. v. U. S. (1910), 216 U. S. 504, 514. And Cave, J., In re Sheffield etc. Society (1889), says "A corporation is a legal person just as much as an individual." L. R. 22 Q. B. D. 470 on 476.

[36] See Cases, Wilgus, Corp. Cases, pp. 33-72.

[37] See bibliography in note 26 above, particularly, Blackstone, Gierke, (Maitland's tr. Introduc., pp. xxxi-xxxviii), Kent, State Trials, Trustees Dart. Coll. v. Woodward (Washington's Opinion), Wilgus, (Corp. Cases, pp. 113-170), Wright.

[38] Kent, Comm., Vol. 2, pp. 268-9; Taylor's El. Civil Law, pp. 567-57c; Digest, xlvii, 22, 1 and 3 (Marcian); Digest, iii, 4, 1 (Gaius).

[39] Maitland's Summary, in Gierke's Pol. Th. of Mid. Ages, p. xxx.

"none but the king can make a corporation."[40] And as we all know with us today "the right to form a private corporation can only be acquired from the state."[41]

From the Feudal law this privilege was not merely a personal privilege, but was looked upon as a privilege of a *property* kind. The Medieval mind had a peculiar tendency to look upon all sorts of immaterial or incorporeal things and privileges as property; as for example, the *right of advowson.* Feudal rights and incidents, too intangible to be called *holdings,* were yet considered *property* in the Medieval law.[42] In 1691 it was said "the whole frame and essence of the corporation consist" of the franchises which are "the ligaments of this body politic."[43] COMYNS says in 1740, "A corporation is a franchise created by the king." BLACKSTONE and KENT say the same. Such a view is not dead nor sleepeth yet. It was the real basis of Mr. Justice WASHINGTON'S decision in the *Dartmouth College* case.[44] In 1887, Mr. Justice BRADLEY said: "A franchise is a right of public concern. * * * No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise."[45] Ten years ago the Supreme Court of California said "The right to be and exist as a corporation is a grant by the sovereign power, a valuable right" and subject to taxation.[46] And just the other day it was said: "A corporate franchise is the right to exist as an entity for the purpose of doing things permitted by law."[47] And the exercise of such right is subject to taxation.[48]

The third of these,—that a corporation is really an association or collection of individuals, is strongly insisted upon by Mr. Morawetz and Mr. Taylor. Mr. Morawetz says: It is "essential to bear in mind distinctly that the rights and duties of an incorporated association, are in reality, the rights and duties of the persons who compose it, not of an imaginary being."[49] And Mr. Taylor: There are "two

[40] Y. B., 49 Ed. III, 17.

[41] People v. Mackey (1912), 255 Ill. 144, 156, 99 N. E. 370.

[42] McKechnie, Magna Carta, pp. 383-4.

[43] King v. London, Carthew, 217; 1 Show. 275-6.

[44] 4 Wheat. 518 on 657, (1819).

[45] California v. Central Pacific Ry. Co., 127 U. S. 1, 40.

[46] Bank of California v. City & Co. of San Francisco (1904), 142 Cal. 276, 100 Am. St. R. 130, 75 Pac. 832; Crocker v. Scott, 149 Cal. 575, 87 Pac. 89; Western Union Oil Co. v. Los Angeles (1911), 161 Cal. 204, 118 Pac. 721; Farr Alpaca Co. v. Commw. (1912), 212 Mass. 156. Compare Detroit &c. Ry. Co. v. Common Council (1901), 125 Mich. 673, 84 Am. St. R. 589, 85 N. W. 96; Blackrock Copper Min. Co. v. Tingey (1908), 34 Utah 369, 98 Pac. 180; Cooper v. Utah Light &c. Co. (1909), 35 Utah, 570, 102 Pac. 202. See 1 Cal. Law Rev. 91 (1913).

[47] State v. Business Men's Assn. (1914), — Mo. App., —, 163 S. W. 901.

[48] People v. Sohmer (1914), 147 N. Y. S. 611.

[49] Morawetz Private Corp. 2d Ed. Preface and §§ 227-231; See Note Wilgus Cases, p. 110.

meanings of the term corporation; the one, the sum of legal relations subsisting in respect to the corporate enterprise; the other the organic body of shareholders, whose acts cause the operation of the rules of law in the constitution. These two conceptions include all that is really connoted by the term in whatever sense used. And, if so, what has become of the venerable 'legal person'? Is he still somewhere, as he has aways been imagined? Or is he nowhere as he has always actually been? Shall we say he is the combination, the mystic unification of our two conceptions? Better not; better forget him."[50]

Theory of the Trust.[51]

Trusts of course are the creation of the English courts of equity. As MAITLAND says, "Of all the exploits of equity the largest and most important is the invention and development of the

[50] Taylor, Private Corp., Preface, §§ 48-51. See Note Wilgus Cases, p. 111.

[51] Bibliography:

Ames, J. B., The Origin of Uses and Trusts, 21 Harv. Law Rev., 261-274 (1908), 2 Select Essays Anglo-Am. Legal Hist. 737-752, Lectures on Legal History, pp. 233, 243. Cases on Trusts (1893).

Chandler, A. D., Express Trusts under Common Law (1912).

Cook, W. W., Law of Private Corporations, 7th Ed., Vol. 2, § 622 (1913).

Cook, Prof. W. W., The Place of Equity in Our Legal System, Am. Bar. Ass'n Rept. 1912, pp. 997-1009, 3 Am. L. S. Rev. 173.

Conyngton, Thomas, Corporate Organization, Ch. XLIII, pp. 362-374.

Fletcher, Charles, Essay on Estates of Trustees (1835).

Fonblanque, J., Treatise on Equity (1805), Book II, Chs. 1-8.

Gager, E. B., History of Equity in American Colonies and States, in two Centuries of Growth of American Law, (Yale Univ. Studies, 1901).

Gilbert, G., Law of Uses and Trusts, (3d Ed. 1811 Sugden).

Hampson, Sir G. F., Liabilities of Trustees, and Indemnity allowed them by Courts of Equity (1830).

Hart, W. G., The place of trust in jurisprudence (1912), 28 Law Quart. Rev. 290.

Hill, James, Law Relating to Trustees (1846, and subsequent editions).

Hogg, J. E., Legal Estate in English Property Law (1910), 22 Jurid. Rev. 55-9.

Hohfeld, W. N., Relation between Equity and Law (1913), 11 Mich. Law Rev. 537 et seq.

Holmes, O. W. Jr., Early English Equity, 1 Law Quart. Rev. (1885), pp. 162-174, 2 Select Essays Anglo-Am. Leg. Hist. 705.

Jenks, Edward, The Legal Estate, 24 Law Quart. Rev. (1908), pp. 147-156.

Kerley, D. M., Historical Sketch of Equity Jurisdiction of Court of Chancery (1890).

Kenneson, T. D., Cases on Trusts (1911).

Lewin, Thomas, Law of Trusts and Trustees (1839, and subsequent editions).

Loring, A. P., Trustees Handbook (3d Ed. 1907).

Maitland, F. W., Equity (1910-13); Trust and Corporation, 3 Coll. Papers, 321-404.

Newbold, D. M., Notes on Introduction of Equity Juris. in Maryland 1634-1720 (1906).

Page, T. N., Disappearance of fiduciary principle, 16 Am. Law Rev. 247, 302 (1908).

Perry, J. W., Treatise on Law of Trusts and Trustees, (1872 and later editions).

Pike, L. O., Common Law and Conscience, 1 Law Quart. Rev. (1885), 443-454; 2 Select Essays Anglo-Am. Leg. Hist., 722.

Pollock and Maitland, Hist. of Eng. Law, Vol. I, p. 520; Vol. II, pp. 228-239.

Robinson, C., History of High Court of Chancery, Vol. I (1882).

Sanders, F. W., Essay on Uses and Trusts (1791, and later editions).

Trust. It is an institute of great elasticity and generality; as elastic, as general as contract."[52]

Our trust is refined from the doctrine of uses as they were established in our law before the Statute of Uses.[53] The older writers traced uses to the Roman *fidei-commissa,* introduced in the Roman law, 170 years B. C. to evade the laws prohibiting the appointing of a daughter, stranger or an exile as an heir. The testator devised his property to a qualified citizen as his heir, universal devisee, or executor, with a request, by precatory words, depending only on the good faith or honor, strong in the Roman breast, of such heir to restore or hand over the inheritance, or a part of it, to the designated person. To secure the enforcement of the request the testator implored or appealed to the Emperor, to AUGUSTUS, who flattered by such appeal, on the advice of a committee of jurisconsults, made these requests obligatory, under the direction of the Consuls; and later under MARCUS AURELIUS, a *praetor* was appointed to enforce them, acting *extra ordinem.*[54]

Later writers, such as POLLOCK and MAITLAND, doubt the direct descent of our doctrine of uses and trust from this Roman original,[55] mainly because different terms were used in our early law. They say, however, that "The Frank of the *Lex Salica,* (475 A. D.)

Scrutton, T. S., Roman Law Influence in Chancery, 1 Select Essays Anglo-Am. Legal Hist., p. 208 et seq.

Sears, J. H., Trust Estates as Business Companies (1912).

Spence, George, Equitable Jurisdiction of the Court of Chancery (1846).

Tax Commissioner of Massachusetts, Report on Voluntary Ass'ns (1912); also Report of Special Commission to investigate voluntary associations in Massachusetts (1913). (No. 1788 House.)

Underhill, A., Law Relating to Private Trusts and Trustees (1896).

Veeder, V. V., A Century of English Judicature, 1 Select Essays Anglo-Am. Leg. Hist., p. 730, 13 Green Bag, 23 et seq.

Whitlock, A. N., Classification of the Law of Trusts, 1 Cal. Law Rev. 215 (1913).

Willoughby, R. M. P., The Legal Estate (1912), Cambridge Univ. Press.

Willis, J. W., Duties and Responsibilities of Trustees (1827).

Wilson, S. D., Courts of Chancery in the American Colonies, 28 Am. Law Rev. (1884), pp. 226-255, 2 Select Essays Anglo-Am. Leg. Hist. 779.

Woodruff, E. H., History of Chancery in Massachusetts, 5 Law Quart. Rev. 370 (1889).

Of course much will be found in the standard works on Equity not mentioned above such as Abbott's Cases (1909), Adams (1850 and later editions), Beach (1892), Bispham (1878 and later editions), Eaton (1906), Hutchins and Bunker's Cases (1902), Langdell (1904), Pomeroy (1881 and later editions), Smith, H. A. (1908), Snell, G. H. T. (13th Ed. 1901), Story (1836 and later editions).

[52] Maitland, Lectures on Equity, p. 23.

[53] Ib. p. 24.

[54] Spence, Equitable Jurisdiction, Vol. I, p. *435, Kent, Com., Vol. 4, p. *289. Bernard's First Year of Roman Law, §§ 813-818; Roby, Roman Private Law, Vol. I, p. 356.

[55] Maitland, Equity, p. 32; Pollock and Maitland, Hist. Eng. Law, 2d Ed., Vol. II, p. 239.

is already employing it; by the intermediation of a third person, whom he puts in seisin of his lands and goods, he succeeds in appointing or adopting an heir."[56] MAITLAND finds the same thing in the Lombard law. He says: "The Lombard cannot make a genuine testament. He therefore transfers the whole or some part of his property to a *Treühander,* who is to carry out his instructions."[57] Mr. Justice HOLMES says that "The feoffee to uses of the early English law, corresponds point by point to the Salman of the early German law. * * * The Salman, like the feoffee, was a person to whom land was transferred in order that he might make a conveyance according to his grantor's directions, * * * usually after the grantor's death, the grantor reserving the use of the land himself during his life. To meet the chance of the Salman's death before the time for the conveyance over, it was common to employ more than one, and persons of importance were selected for the office. The essence of the relation was the *fiducia* or trust reposed in the *fidelis manus,* who sometimes confirmed his obligation by an oath or covenant. * * * The executor of the early German will was simply a Salman whose duty it was to see legacies and so forth paid if the heirs refused. * * * There can be no doubt of the identity of the continental executor and the officer of the same name described by GLANVILLE (1180); and thus the connection between the English and the German law is made certain.[58]

"The beneficiary had however no action to compel the performance of the duty of the continental Salman,"[59] and "the transformation of the honorary obligation of the feoffee into a legal obligation was a purely English development."[60] This duty was enforced against executors in the case of bequests of personal property, in the ecclesiastical courts, and possibly to some extent in the case of lands devisable by custom in some of the cities.[61]

For a long time even before the Conquest the term *use* had been in use, but yet as MAITLAND wittily says, it has "mistaken its own origin." The word is not the Latin "usus" (i. e. a *using* of a thing), but the Latin *opus.* From the 7th and 8th centuries, *ad opus,* for "on his behalf," is found in Lombard and Frank documents;

---

[57] Trust and Corporations, 3 Coll. Papers, p. 327.

[58] Holmes Early Eng. Equity, 1 Law Quart. Rev. 162-174 (1885); Select Essays Anglo-Am. Leg. Hist., Vol. 2, p. 705. Maitland, Equity, p. 26.

[59] Note 4, Ames, Lectures on Legal History, Origin of Uses, p. 237. 2 Select Essays Anglo-Am. Leg. Hist., 737 et seq.

[60] Ames, Lectures on Legal Hist. p. 237.

[61] Ames, Ib., p. 235; Holmes, Early Eng. Equity, 2 Select Essays Anglo-Am. Leg. Hist., pp. 710-714.

in the Old French these become "al oes, ues," which the English tongue, confused with "use." The Latin records however read *ad opus,—ad opus Johannis,* i. e. on behalf of John. As far back as Domesday Book, one person is constantly doing things *ad opus* another; the Sheriff seizes *"ad opus Regis, as os le Roy."*[62] If one is going on a crusade he occasionally conveyed his land to another to be held to the use of his children, or his wife or sister, for he was not certain whether a woman could hold a military fee, or whether he could enfeoff his wife. So too, a man might want to give his property to a convent, to the use of the library, or the hospital. And when the Franciscan friars came as missionaries to the English towns, about 1225, with their rule forbidding them to own anything, the faithful benefactor, who wanted to give them some poor dormitory in which to live and sleep, struck upon the curious plan of conveying a house to the borough community "to the use of," or "as an inhabitation for" the friars. And by the time of BRACTON, "plots of land in London had been thus conveyed to the city for the benefit of the Franciscians."[63] This was in the 13th century.

In the 14th century, landowners began conveying lands to their friends *ad opus suum,* to the use of themselves. Why? Because they have found they can in effect make a will of their lands in this way; for if A conveys his land to B to hold on behalf of A while he lives, and then when A dies to give it to some one suggested by A before he dies, it is equivalent to a will. The direct devise of lands under the feudal system had been denied to landowners for two or three centuries. Men especially among the great want to provide for their daughters and younger sons. John of Gaunt wants to provide for his illegitimate children. There were other reasons also; to avoid the feudal burdens of wardship, marriage, forfeitures and escheats, the statutes of mortmain,—and perhaps also to defraud one's creditors.[64] Between 1396 and 1403, the Chancellor had interfered to protect these beneficiaries, and is ordering defendants by the writ of subpœna, "to do whatever shall be ordained by us," or to "do what right and good faith," or "good faith and conscience" demand, since the plaintiff "cannot have remedy by the law of the Holy church nor by the common law;[65] and one great doctrine, "Equity acts upon the person," was taking

[62] Maitland, Equity, p. 24. See Note, Pollock and Maitland, Hist. of Eng. Law, 2d Ed., Vol. II, p. 233.

[63] Pollock and Maitland, Hist. Eng. Law, Vol. 2, 2d Ed., p. 231.

[64] Maitland, Equity, pp. 25-30.

[65] Ames, Lectures on Legal History, Origin of Uses, Note 3, p. 236, and note 1, p. 238.

shape. "The law regards chiefly the right of the plaintiff and gives judgment that he recover the land, debt, or damages because they are his. Equity lays stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear."[66]

This term *'ad opus'* in the early time was used also for what we now use "agency." In the very ancient days both in France and England, a man, such as the King's officer, will receive money not as agent of, but to the use of, *ad opus,* the king, or some one else; and in time, where the party is authorized to do some act in reference to money or chattels on behalf of another, as where A's bailiff, B, takes A's corn to market, sells it, and buys cattle, *ad opus* A, this develops into a law of agency, so that if B converts the corn or cattle or money received to his own use (ad opus suum proprium) the common law will recognize the wrong and furnish a remedy in debt or account.[67]

It was not so however in the case of land, although it looks much like a contract, and there certainly is an agreement when "in consideration of a conveyance made by A to X, Y, Z, they agree that they will hold the land for the behoof of A, will allow him to enjoy it, and will convey it as he shall direct."[69] Why is this not a contract, and why did the courts not enforce it? There are two or three reasons: (1) The feofee did not formally promise, or covenant under his seal; (2) In the 14th century the common law had not begun to enforce 'the simple contract,' and by the 15th century when the simple contract began to be enforced in the courts of common law," in an action of assumpsit, the Chancellor was already in possession of this field of jurisdiction and was already enforcing uses by means of a procedure far more efficient and far more flexible than any which the old courts could have employed; (3) Where the promise was to convey as directed after the death of the feoffor, of course the feoffor could not enforce it, his heir would not, for it would be to his interest not to do so; so the only one wanting to enforce it would be the beneficiary; the court of Chancery early recognized this, and gave him the remedy, and even in the earliest instances where the *trustor* and the *cestui que use*[70] are the same, still it is as "destinatory," not as "author of the trust" that he has the remedy. This marks it off from contract. (4) Then again if the feoffor who was also the *cestui que use,* had

[66] Ames Ib., p. 231.
[67] Pollock and Maitland, History of Eng. Law, 2d Ed., Vol. II, pp. 229, 230.
[68] Ib., p. 231.
[69] Maitland, Equity, p. 28.
[70] On the proper use of this term, and cestui que trust, see 26 Law Quart. Rev. 196.

only a contract right, it would be a chose in action, and inalienable, which the landowner did not want.[71]

And so what kind of a right is this which the destinatory, the beneficiary, the *cestui que use,* has? Is it a right *in rem* or *in personam?* To follow MAITLAND here: "It seems a little of both."[72] "The right of *cestui que use* or *cestui que trust* begins by being a right *in personam.* Gradually it begins to look somewhat like a right *in rem.*[73] But it never has become this, no, not even in the present day." "The new class of rights is made to look as much like rights *in rem* (estates in land) as the Chancellor can make them look; that is in harmony with the real wish of the parties who are using the device. They are also taking the common law as their model. Thus we get a conversion of the use into an incorporeal thing,—in which estates and interests exist,—a sort of immaterialized piece of land."[74] "The use came to be conceived of as a sort of metaphysical entity in which there might be estates very similar to those which could be created in land, estates in possession, remainder, reversion, estates descendible in this way or that."[75] But it is "neither *jus in re* nor *ad rem,* neither right, title nor interest in law, but a species of property unknown to the common law, and owing its existence to the equitable jurisdiction of chancery, resting upon confidence in the person and privity of estate; * * * it was rather a hold upon the conscience of the feoffee to uses than a a lien upon, or interest in the land; and the principle upon which it was founded was that the feoffee was bound in conscience to follow the direction of the feoffor."[76]

"The trustee is the owner, the full owner of the thing, while the *cestui que trust* has no rights in the thing."[77]

This thing,—the trust res, or trust fund owned by the trustee the court of chancery converted into an incorporeal thing which can change its dress but maintain its identity. "Today it appears as a piece of land; tomorrow it may be some gold coins in a purse;

---

[71] Maitland, Equity, pp. 28-31.

[72] Ib., p. 23.

[73] Ib., p. 29.

[74] Ib., p. 31.

[75] Ib., p. 33.

[76] Stebbins, Senator, in McCartee v. Orphan's Asylum (1827), 9 Cowen (N. Y.) 437, 18 Am. Dec. 516, 1 Wilgus, Corp. Cas. 1021. Weltner v. Thurmond (1908), 17 Wyo. 268, 129 Am. St. R. 1113, 98 Pac. 590, 99 Pac. 1128. On the nature of a trust, see particularly cases in Ames's Cases on Trusts, Secs. I to V, pp. 1-77, Ch. I; Secs. I and II, Ch. II, pp. 235-278. Hart, W. G., The place of trust in jurisprudence (1912), 28 Law Q. Rev. 290; Whitlock, A. N., Classification of the law of trusts (1913), 1 Cal. Law Rev. pp. 215-221.

[77] Maitland, Equity, p. 47. Ames's Cases, Ch. II, Sec. II, pp. 235-278; Kenneson's Cases, Ch. II, pp. 111-152.

then it will be a sum of Consols; then it will be shares in a Railway Company; and then Peruvian Bonds. When all is going well, changes of investment may often be made; the trustees have been given power to make them. All along the 'trust fund' retains its identity. * * * But the same idea is applied even when all is not going well."[78]

Mr. MAITLAND contends stoutly, and perhaps correctly, notwithstanding frequent loose statements to the contrary, that the beneficiary has no *right in the thing,* in *the trust fund;* the equitable estates and interests are not *jura in rem;* * * * but essentially *jura in personam,* not rights against the world at large but rights against certain persons.[79] Notwithstanding this, the beneficiary is treated as having an estate in fee simple, or in fee tail, or for life in the use or trust, or an equitable estate; or as having a term of years in the use or trust. These estates and interests were to devolve and be transmitted like the analogous estates and interests known to and protected by the common law. The equitable fee would descend to heirs general, the equitable estates tail to heirs in tail, equitable chattel interests would pass to the executors or administrators. * * * The equitable estate or interest could be conveyed or assigned *inter vivos;* and they can be devised or bequeathed; curtesy but not dower could be had in them; they did not escheat; and they could be reached by a creditor of the beneficiary.

All these look like rights *in rem.* Yet "the right of the *cestui que trust* is the benefit of an obligation,"[80] and is available against not the whole world, but only against certain persons; these are: (1) The trustee who has undertaken to hold in trust; (2) "those who come to the lands or goods by inheritance or succession from the original trustee, his heir, executors, administrators, or doweress; (3) the trustees creditors; (4) the trustees donee, who takes without giving a valuable consideration; (5) the purchaser from the trustee for value, who knows of the trust; (6) the purchaser from the trustee who ought to know of the trust," "who would have known of the trust had he behaved as prudent purchasers behave,"—according to the estimate of equity judges,—and not of an ordinary jury. If he did not come up to this standard he was "affected with notice," or had "constructive notice," and was not protected.[81]

"But here a limit was reached. Against a person who acquires a legal right *bona fide,* for value, without notice express or con-

[78] Maitland, Trust and Corporation, 3 Coll. Papers, pp. 350-351.

[79] Maitland, Equity, p. 112, et seq. Langdell, Equity, pp. 5-6, 254 (2d Ed.).

[80] Ib., p. 116. But compare Mr. Whitlock's article in 1 Cal. Law Rev. 215, and Bispham's and Pomeroy's Classifications.

[81] Maitland, Equity, pp. 117-119.

structive of the existence of equitable rights those rights are of no avail,"—and here is the difference between the beneficiary's right, and a true right *in rem.*[82]

Creation of Corporations.

Long ago, Lord COKE in the *Case of Sutton's Hospital,* said these "things are of the essence of a corporation: (1) Lawful authority of incorporation; and that may be by four means, sc. by the common law, as the King himself, etc.; by authority of parliament; by the King's Charter, (as in this case); and by prescription. The 2d which is of the essence of the incorporation, are parties to be incorporated, and that in two manners, sc. persons natural, or bodies incorporate and political. (3) A name by which they are incorporated, as in this case governors of the lands, etc. (4) Of a place, for without a place no incorporation can be made; here the place is in the charter house in the County of Middlesex. * * * (5) By words sufficient in law, but not restrained to any certain legal and prescript form of words."[83]

This statement, for the most part is as applicable and accurate today as it was three hundred years ago when it was written. We yet have corporations existing by the common law,—as the state itself is a corporation, and our governors and officers are corporations sole for certain purposes, by implication or necessity.[84] Public corporations may exist with us by prescription, and private also, where the statute of limitations runs against the state in quo warranto proceedings.[85] We still have corporations in this country that exist by virtue of a King's charter granted before the revolution, as in the case of Dartmouth College.[86] This method of creating corporations *de novo,* still exists in England, but of course not with us; and although Lord BALTIMORE, under authority conferred upon him by the Charter of Maryland in 1667 incorporated the Mayor, Recorder, Aldermen and Common Council of the City of St. Marys, and William PENN, by a similar provision in the Charter of Pennsylvania, in 1701 granted a charter of incorporation to the city of

[82] Ib., p. 119.

[83] The Case of Sutton's Hospital (1613) 10 Coke 1, 23a et seq., 1 Wilgus Cases, p. 264.

[84] The Governor v. Allen (1847), 8 Humph. (27 Tenn.) 176, 1 Wilgus, Corp. Cases, 270, note 275.

[85] Greene v. Dennis (1826), 6 Conn. 292, 16 Am. Dec. 58, 1 Wilgus Cases, 275, note 278; State v. Pawtuxet Turnpike Co. (1867), 8 R. I. 521, 94 Am. Dec. 123; People v. Oakland Co. Bank, 1 Doug. (Mich.) 285.

[86] Trustees of Dartmouth College v. Woodward (1819), 4 Wheat. (17 U. S.), 518, 1 Wilgus, Corp. Cas. 708.

Philadelphia,[87] no such power now exists with us in any executive or judicial office. And since the American revolution the power to create corporations, with us, has resided in our legislative bodies exclusively.[88] Such power, however, when in our legislatures, is qualified only by constitutional limitations.[89] And in the absence of constitutional provision the legislature may act by special or general laws. General incorporation laws probably existed at Rome.[90] In England the first general incorporation law was enacted by Parliament in 1597 for the erection of hospitals; this was made perpetual in 1624; it is still in force, and Lord COKE, in his Second Institute gives the act and a proper form for incorporation under it.[91] The political dogmas of the American and French revolutions, that all men are created equal, and are entitled to equal rights, issued in the demand for equal privileges in the formation of corporations.

To satisfy this demand and prevent the fraud and legislative jobbery incident to the granting of the privileges of incorporation by special acts, it became the policy to incorporate under general laws.

As early as 1784, general laws were passed in New York for the incorporation of Churches; these were followed rapidly in other states. In 1811, New York passed the first general incorporation law for incorporating manufacturing corporations. This was followed in Massachusetts in 1836; in Connecticut and Michigan in 1837; and by Indiana in 1838.[92]

But passing general laws did not meet the whole difficulty, for the legislatures continued to create corporations under special acts. Constitutional limitations therefore became necessary. In 1821 New York required the assent of two-thirds of the members of both houses of its legislature.

In 1838 Florida by constitutional provision forbade the incorporation of churches by special act, and directed that a general law be enacted for their creation. In 1845 Louisiana did the same for all except municipal corporations. In 1846 New York did likewise;

[87] McKim v. Odom, 3 Bland Ch. (Md.) 407, 1 Wilgus Corp. Cas. 222; 1 Wilson's Works, (Andrews' Ed.), 561; Machen, Modern Law of Corporations, p. 3, note 3. Poore's Charters Vol. 2, p. 1388, Par. 14 (North Carolina).

[88] Franklin Bridge Co. v. Wood (1853), 14 Ga. 80, 1 Wilgus, Corp. Cas. 279, note 286.

[89] Bell v. Bank of Nashville (1823), Peck (7 Tenn.) 269; Penobscot Boom Corp. v. Lamson (1839), 16 Me. (4 Shep) 224, 33 Am. Dec. 656, 1 Wilgus, Corp. Cas. 283; 1 Hamilton's Works, iii; 1 Wilson's Works, 561; Luxton v. North River Bridge Co. (1894), 153 U. S. 525.

[90] Baldwin, Modern Political Institutions, Freedom of Incorporation.

[91] 39 Eliz. Ch. 5 (1597); 21 Jas. 1, Ch. 1, (1624); 2 Inst., p. 723; 6 Encyc. of Laws of England 233.

[92] Note (b) 2 Kent's Com. p. [342]. Laws of New York 1784, 7 Secs., Ch. 18; Laws of N. Y., 1811, Ch. 67, 34 Secs. Notes 1 and 2, 1 Machen, Corp. p. 15.

and now almost every state constitution provides that the legislatures shall pass no special act creating corporations or conferring corporate powers, but all corporations shall be created under general laws which shall be subject to amendment and repeal by the legislature at any time.[93] Mr. FROST says special charters can be granted in only seven states.[94]

In speaking of the general incorporation laws, Mr. MACHEN says, "The statutes in some states consist of a jumble of old acts thrown together almost indiscriminately with more recent amendments. In other states, the legisatures have intended to display the utmost liberality; but unfortunately this disposition has often been evinced by removing salutary restrictions and at the same time, in order to make a show of legislative regulation, by imposing vexatious and unreasoning restraints."[95]

Mr. FROST says that "a great majority of the business corporation acts in force in this country today are sadly in need of revision. * * * The incorporation laws of Georgia, Pennsylvania, and Maryland are veritable "legal antiques," * * * and the acts of many of the states are "wonderfully and fearfully made."[96] And every lawyer that has tried to find out the real meaning of the corporation statutes of a single state, knows that such mild expressions are altogether too euphonious to do the subject justice.

Not only are incorporation laws notoriously uncertain in meaning, but they are inflexible so long as they last, and when, in what way, and to what extent, they will be changed by the legislature, Providence only, if anyone, can tell.

Then again one must at his peril substantially comply with the law whether he can determine its meaning or not; and in many states if he fails so to comply he can only say some sort of disaster will follow, exactly what under the present state of authorities, he cannot tell, for it is concealed in *gremio legis et curiae;* in one place it will be *de facto* existence;[97] in another not;[98] in one a full partnership liability for members; in another an individual liability for participants,[100]—but for all, even though they acted in good faith, it will be something different from what they intended.

---

[93] Private Corporations, Wilgus, p. 118, Const. Fla. 1838, Art. 13, Sec. 1; Louisiana Const. 1845; New York Const. 1821, Art. 7, Sec. 9; Const. 1846, Art. 8, Sec. 3.

[94] Frost, Incorporation and Organization of Corporations, p. 2 (4th Ed).

[95] Machen, Corp. p. 17.

[96] Frost, Inc. & Organ. Corp. pp. 3, 7 (4th Ed.).

[97] Finnegan v. Noerenberg (1893), 52 Minn. 239, 38 Am. St. Rep. 552, 1 Wilgus, Cases, 614.

[98] Kaiser v. Lawrence Sav. Bank (1881), 56 Ia. 104, 1 Wilgus, Cases 607; Bergeron v. Hobbs (1897), 96 Wis. 641, 65 Am. St. R. 85, 1 Wilgus, Cases 611.

[99] Martin v. Fewell (1883), 79 Mo. 401, 1 Wilgus, Cases 673, note 676.

[100] Fay v. Noble (1851), 7 Cush. (Mass.), 188, 1 Wilgus, Cases, p. 677, note 681.

Then too it is difficult, if not impossible, unless the Supreme Court has passed upon it, to say what is the period of corporate gestation, when it begins or when it ends, when corporate birth really occurs, when corporate parturition is complete, when the umbilical cord is cut, and the corporate *"personality"* is acquired. For example, where the statute reads that "articles of incorporation shall be executed stating name, purpose, place of business, term, number of directors, names of those for first year, amount of capital stock, and number of shares, and shall be filed in the office of the secretary of state, and thereupon the signers shall be a corporation," at least four different views are taken: (1) Corporate life for all purposes begins immediately on filing the articles, *ipso facto eo instanti,* without reference to any stock subscription or organization.[101] (2) There is no corporate life until corporate organization, by election or appointment of officers.[102] (3) There is only a qualified corporate existence resulting from filing articles and adult corporate life only after the requisite stock is subscribed and paid in.[103] (4) Corporate life begins on the filing, but the incorporators whether subscribing for stock or not, are tenants in common of the proposed amount until it is duly subscribed by others.[104]

Creation of Express Trusts.

Upon the other hand the creation of an express trust is a matter of the mere declaration of the trustor or declarant, accepted by the trustee, or of a contract between them.[105] There are no special statutes to comply with except the Statute of Frauds, the Statute of Uses, statutes relating to Perpetuities, and to Conveyancing and Recording.

These will be considered in other connections. At this point it is only necessary to say that for the most part these are easily complied with. The Express Trust is a matter of a declaration of an owner or of an agreement between parties under their common law rights and can be moulded to suit the needs and wishes of the parties, and it can be made as certain, definite and clear as the skill of the draftsman will permit in expressing the intentions of the parties,[106]—and it will at least not be defeated by incorrect guesses at the meaning of uncertain, if not inconsistent, provisions of written law. The balance here certainly is in favor of the trust.

[101] Singer Mfg. Co. v. Peck (1896), 9 S. Dak. 29, 67 N. W. 947, 1 Wilgus, Cases 571.
[102] Walton v. Oliver (1892), 49 Kans. 107, 33 Am. St. R. 355, 1 Wilgus, Cases, 565.
[103] Wechselberg v. Flour City National Bank (1894), 24 U. S. App. 308, 1 Wilgus, Cases, 574.
[104] Hawes v. Anglo-Saxon Petroleum Co. (1869), 101 Mass. 385, 1 Wilgus, Cases 581.
[105] Maitland, Equity, pp. 53-56.
[106] Ib., 57-70.

Steps in Creation of Corporations.

Mr. FROST enumerates[107] the various steps necessary to create a corporation under modern business corporation acts, as follows:

(1) The drafting of the articles of incorporation;

(2) The signing of the articles by the requisite number of incorporators, and the acknowledgement of the same before an officer duly authorized to take such acknowledgements;

(3) Filing and recording the articles with the proper state and county officials after payment of the requisite organization tax and filing and recording fees;

(4) Organization of the corporation ready for the transaction of business;

(5) Securing the necessary permit from state officials (if any is required), to transact business in the domiciliary state.

Steps in Creation of Trust.

On the other hand a recent case has said the requisites of a valid trust are: "(1) A designated beneficiary; (2) a designated trustee, who must not be the beneficiary; (3) a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and (4) the actual delivery of the fund or other property, or of a legal assignment thereof to the trustee, with the intention of passing legal title thereto to him as trustee."[108]

Let us consider these things a little more fully in reference to the creation of Corporations and of Trusts.

The Incorporation Paper.

Under all general incorporation laws, some kind of a document must be executed in a particular way, and filed, deposited, or recorded, in a specific way. The name of this document is various,—"deed of settlement," "articles of association," "articles of incorporation," "articles," "certificate of incorporation," "charter," "memorandum of association,"—all of which Mr. MACHEN considers objectionable, and suggests that "incorporation paper" be used, although as he says, that "term does not seem to have been used in any state or country."[109] It seems however that it is not fatal to call it Articles of Association when it ought to be called "Charter."[110]

---

[107] Frost, Inc. and Org. Corp., p. 12 (4th Ed.).

[108] Brown v. Spohr, 180 N. Y. 201, 209, 73 N. E. 14, 16; Central Trust Co. v. Gaffney, 142 N. Y. S. 902, 905, 157 App. D. 501. Kemmerer v. Kemmerer (1908), 233 Ill. 327, 122 Am. St. R. 169, 84 N. E. 256; Ranney v. Byers (1908), 219 Pa. 332, 123 Am. St. R. 660, 68 Atl. 971.

[109] Machen, Corporations, p. 30, § 32.

[110] Kaiser v. Lawrence Sav. Bk. (1881), 56 Ia. 104, 1 Wilgus, Cases 607, on 608.

In any event there must be a written or printed incorporation paper.[111] The drafting of this document, under printed forms, that are usually furnished upon application seems to be a simple matter, and is often done without much professional consideration. However since the document, will constitute, together with the law under which it is executed, a contract of a dual nature,—one between the corporation and the state, and another among the shareholders themselves,[112] to be construed "rigidly in favor of the public and against the corporation;"[113] and since the express powers of a corporation are such as are found expressed in the statute under which the corporation is to be formed, or such, as though not so expressed, may be lawfully claimed, if specified in the incorporation paper, though not otherwise, much skill is required to get the best results.[114] Mr. FROST enumerates 28 different classes of express powers, 21 of which are expressed in most general laws, but 7 of which if desired, must usually be claimed in the incorporation paper, if they can be had at all;[115] and, although formerly it was held that one state could not spawn its corporate progeny to do business in another state, yet that view has been abandoned so completely that the states have become unseemly competitors in vending their corporate wares, to such an extent that every important business seeking incorporation asks where can the incorporation be had with a maximum of power, and a minimum of inconvenience; so where to incorporate has become a question of extreme importance, and can be answered only partially by any lawyer after careful investigation and comparison of statutes. Mr. FROST suggests 21 questions to be answered in this connection, and these certainly do not cover more than half the ground; all these considerations make it certain that the proper drafting of important incorporation papers requires a high degree of skill and experience.[116]

The incorporation paper must be executed as the statute provides, and there are many pitfalls here also. If the statute says that "any number" may form a corporation, by signing articles of association, and stating, among other things, the "names and residence" of the signers, and there are 27 signers, but only two state their residences, the corporation in Indiana, at least, is not *de jure*;[117] so too if the

[111] Utley v. Union Tool Co. (1858), 11 Gray (Mass.), 139, 1 Wilgus, Cases, 597.
[112] Machen, Corporations, pp. 32-33; Wilgus, Corp. Cases, p. 707 et seq.
[113] Oregon Ry. Co. v. Oregonian Co. (1888), 130 U. S. 1, 1 Wilgus, Cases, p. 429.
[114] Machen, Corporations, §§ 48-63, 64-102.
[115] Frost, Inc. & Org. of Corporations, 4th Ed., §§ 17, 18, pp. 34-36.
[116] Ib. § 18, p. 35. Wilgus, Corporations, § 49.
[117] Busenback v. Attica &c. Road Co. (1873), 43 Ind. 265, 1 Wilgus, Cases, p. 600.

residence of directors is omitted when the statute requires it; so where the "principal place of business" is to be stated, it won't do to say "the operations of the company are to be carried on"[118] in a certain county; and in Maryland it seems that even a church, though it has been running as an incorporated body for years, taking a deed for its property, giving a mortgage upon it, issuing bonds, etc., cannot be held liable for its just debts, if its articles were acknowledged before only one justice of the peace, when two were required.[119] And in Wisconsin, where the statute requires the certificate of organization to be filed with the register of deeds,—and where the original certificate of organization was left with the recorder, long enough to be recorded in his office, and was so recorded by copying in the record books, and was then returned to the supposed corporation, instead of being left on file in the recorder's office, there was neither a corporation *de jure* nor *de facto*.[120]

Then too the incorporation fee, varying from a few dollars in some states to a large sum in others must be paid, or there is, at least, in Colorado, neither a corporation *de jure, de facto* nor by *estoppel*.[121] In Arizona it would have cost $45 to incorporate the United States Steel Corporation; it cost $220,000 in New Jersey; and it would have cost in Pennsylvania, $3,666,666.[122]

I have already spoken sufficiently of the variety of view, and conflict of authority as to when the corporate organization is complete, and real corporate birth occurs. Under the statutes of many states certain things must be done before the corporation can "commence business," and there has been much difficulty to determine the result of a failure to do all these things. Perhaps it is reasonably safe to say that if the duty to do these things before commencing business is placed by the statute upon those seeking incorporation, such will be a mandatory condition precedent to valid corporate existence; whereas if the duty seems to be rather upon the corporation, instead of those seeking incorporation, it will be a condition subsequent; but in either case the state can bring *quo warranto,* in the one case against the unsuccessful incorporators, in the other against the defaulting corporation, disaster being possible in either case.[123]

---

[118] Harris & Stickle v. McGregor (1865), 29 Cal. 124, 1 Wilgus, Cases, p. 603.

[119] Boyce v. Trustees &c. (1876), 46 Md. 359, 1 Wilgus, Cases, p. 642.

[120] Bergeron v. Hobbs (1897), 96 Wis. 641, 65 Am. St. R. 85, 1 Wilgus, Cases, 611.

[121] Jones v. Aspen Hardware Co. (1895), 21 Colo. 263, 52 Am. St. R. 220, 1 Wilgus, Cases, 637.

[122] Frost, Inc. & Org. Corp., 4th Ed., Table iii.

[123] Mokelumne Hill Mining Co. v. Woodbury (1859), 14 Cal. 424, 73 Am. Dec. 658, 1 Wilgus, Cases 296; Harrod v. Hamer, (1873), 32 Wis. 162, 1 Wilgus, Cases, 586.

Trust Instrument.

Now let us see how it stands with an Express Trust. MAITLAND says: "In the old days no deed, no writing was necessary to create a use, trust or confidence. I enfeoff you, and by word of mouth I declare that you are to hold to the use of X. You must hold to the use of X. As to trusts this still is law, except in so far as it has been altered by the Statute of Frauds."[124]

The Statute of Frauds of 1677, provided (§ 7) that "All declarations of or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of no effect," but by section 8, this was not to apply where the trust results "by the implication or construction of law."[125]

It is to be noted here that this statute applies only to *real property,* and not personal property;[126] that writing only, *not a deed,* no sealed instrument, no witness, no acknowledgement is necessary; and further no writing is necessary to *create* the trust, but only to *manifest and* prove it "The statute will be satisfied if the trust can be manifested and proved by any subsequent acknowledgement by the trustee, as by an express declaration by him or by a memorandum to that effect, or by a letter under his hand, or by a recital in a deed executed by him; and the trust, however late the proof, operates retrospectively from the time of its creation."[127] But Courts of Equity went further and held "the Statute of Frauds does not prevent the proof of fraud," and "it is a fraud for a person who knows land has been conveyed to him in trust, to deny the trust and claim the land himself."[128]

In a few states this section of the Statute of Frauds is not in force, and in a few, a deed instead of merely a writing is required, but in most states the statute is in force with the effect above given.[129]

As noted it does not apply to personal property, nor does it require a contract or consideration to make one a trustee.[130]

The 9th section of this statute however required that every grant or assignment of a trust, that is the beneficial interest, *"be in writing,"*

---

[124] Maitland, Equity, p. 57.

[125] 29 Chas. II, c. 3. Maitland's Equity, p. 57; Ranney v. Byers, (1908), 219 Pa. 332, 123 Am. St. R. 660, 68 Atl. 971; Ames, Cases, § 8, pp. 176-189.

[126] Maitland, Equity, pp. 58-59.

[127] Lewin, Trusts, 11th Ed., p. 56; Maitland, Equity, p. 58.

[128] Maitland, Equity, 59; Rochefoucauld v. Bonstead, (1897), 1 Ch. 196.

[129] Cook, Trusts & Tusttees, § 53; Ames, Cases, pp. 176-177.

[130] Maitland, Equity, p. 53; Cook, Trusts & Trustees, §§ 45-47.

and not merely manifested or proved by a writing.[131] So too the 13th Elizabeth forbidding all conveyances to delay, hinder or defraud, creditors; and the 27th Elizabeth forbidding voluntary conveyances to defraud and deceive subsequent purchasers, of course, apply to conveyances in trust as well as to other conveyances. These are generally in force in this country.[132]

To quote MAITLAND again: "The creation of a trust may be a perfectly unilateral act, there may not be more than one party to it. * * * I declare myself a trustee of this watch for my son who is in India. If I afterwards sell that watch, although my son has never heard of the benefit that I had intended for him, I commit a breach of trust and my son has an equitable cause of action against me."[133]

While it is usually said that "no one can be compelled to undertake a trust," yet because courts of Equity have been so jealous of its pet, MAITLAND points out "In practice it would not be very sage to rely upon this doctrine, for one may very easily do something or say something that can be regarded as an acceptance of the trust" with all its attendant duties, that cannot be easily got rid of. "Therefore if you hear that anyone has been conveying property to you as a trustee, and you do not wish to be burdened with a trustee's duties, you will be wise in repudiating in some emphatic manner the rights and the duties which were to have been thrust upon you."[134]

No specific words are necessary. "The words 'use' and 'trust' are not sacramental terms." In fact "the most untechnical words," mere precatory words, such as "desire," "will," "request," "entreat," "beseech," "recommend," "hope," "do not doubt," have been held sufficient in wills; all that is required is a reasonably clear expression of the declarant.[135]

The *Statute of Uses*, 27 Henry VIII, 1535, provided that the legal estate should follow the use, so that the beneficiary should thereafter become the legal owner. It read that wherever one person "was seized of land to the use of another," in fee simple, or fee tail, or for life, or for years, the latter shall be deemed to be in lawful, seizin, estate, and possession, of such land in such like estate as he had in the use.[136] It is to be noted (1) The Statute does not apply to chattels personal. (2) Nor does it apply to leaseholds for years, that is where the estate in the trustee is for years, since seizin applied

---

[131] Maitland's Equity, p. 58.

[132] Bispham, Equity, §§ 241, 250.

[133] Maitland, Equity, pp. 53-54.

[134] Maitland, Equity, pp. 55-56.

[135] Maitland, Equity, pp. 38, 66; Kemmerer v. Kemmerer (1908), 233 Ill. 327, 122 Am. St. R. 169, 84 N. E. 256; Ames, Cases, pp. 77-107; Kenneson, Cases, pp. 16-21.

[136] Maitland, Equity, 35; Kenneson, Cases, 34-37.

only to freeholds; but on the other hand if land is conveyed to A and his heirs to hold to the use of B for 1,000 years, this use is executed and B becomes the legal owner, not of the fee, but of the term of years; but if B assigns it to X to the use of Y, the latter will have only an Equitable estate. (3) Again the Statute does not apply where there is an *active trust*. "I convey land unto A and his heirs, to the use that they shall sell the land and divide the proceeds among my children, or upon trust that they shall so sell and divide. The Statute has nothing to say to this case. You do not find one person seized in trust for another person, you find A seized upon trust to make a sale." The test seems to be, does the instrument merely tell A that B is to have the enjoyment or does it impose upon A some special duty in regard to the property as to manage and control it, and collect and pay the profits to the beneficiary?; if the latter the trust is active, not passive, and the Statute of Uses does not thrust the legal title on the beneficiary. (4) Finally after *Tyrrell's Case* in 1557, it was held that the Statute exhausted itself in executing the first use, and so, in the case of a use upon a use, it did not execute the second use.[137] This however is a matter that applies to conveyancing.

Again no filing or recording of the trust instrument is necessary to make the trust valid, at least as to the parties or those who know or ought to know of its existence or terms.[138]

The trust deed in the *Sugar Trust* case provided that "The custody of the deed was to be in the president of the board, with sole and independent control, and not to be shown to any corporation, firm or person whatsoever except by express direction of the board."[139] If it is required to be put in the form of a deed, as in some states, then, of course, it must conform to the statutes relating thereto, and those relating to registration and recording such deeds, in order to furnish constructive notice. But these rules are simple, definite and certain, and easily complied with.[140] Unless the trust is to do business in an artificial name, or as a partnership, and there are statutes requiring registration, there are no other statutes except in a few states, affecting the creation of trusts, except those relating to perpetuities. These will be referred to in other connections.

Again no fees are to be paid to the state, or other officers, except recording fees when the instrument is a deed of conveyance. Of course if the legal estate in land is conveyed in trust, the rules relating to the conveyance of the legal title to the trustee, apply just the

[137] Maitland, Equity, 35-38; Tyrrell's Case, 2 Dyer, 155a, pl. 20, Kenneson, Cases, 37.
[138] Carson v. Phelps, (1873), 40 Md. 73.
[139] People v. North River Sugar Ref. Co., (1890), 121 N. Y. 582, 18 Am. St. R. 843, 1 Wilgus, Cases, 100.
[140] 39 Cyc. 55-56.

same as they apply to a conveyance of land to any other party. And in general whatever rules apply to the transfer of any particular kind of property, to another person, will apply when such is to be conveyed to a trustee in trust.[141] And a promise to create a voluntary trust will not be enforced. The rules we have been discussing apply only to the creation of the trust estate itself.

It seems here again that the balance of simplicity so far as formalities of creation are concerned is in favor of the trust.

H. L. WILGUS.

University of Michigan.

(To be continued.)

---

[141] Ib.